STATE OF MICHIGAN

IN THE SUPREME COURT

LANZO CONSTRUCTION COMPANY,

Plaintiff-Appellant,

vs.

SC: 130992
COA: 264165

WAYNE STEEL ERECTORS,

Wayne CC: 04-408824 CK

Defendant-Appellee.

/

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/

130992
Supp

**SUPPLEMENTAL BRIEF BY DEFENDANT-APPELLEE, WAYNE STEEL ERECTORS, IN RESPONSE TO SUPREME COURT'S ORDER OF SEPTEMBER 15, 2006**

**PROOF OF SERVICES**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF FACTS

This brief is filed in response to the Supreme Court's order of September 15, 2006 which directed the Clerk to schedule oral argument on whether to grant the Application [by Lanzo Construction Company] or take other peremptory action.

The order further directed that the parties shall address:

> (1) the admission by Fernando Agueros at his deposition that he misjudged the distance to the column when he swung around the rebar that he was carrying and the leading ends of the rebar struck the column, causing his fall; and
>
> (2) whether that admission establishes that Agueros was negligent, such that the accident was not the result of the sole negligence of the plaintiff, thereby rendering MCL 691.991 inapplicable.

This supplemental brief is filed in response to this order.

## ARGUMENT

### I. THERE IS NO EVIDENCE THAT THE UNDERLYING PLAINTIFF, FERNANDO AGUEROS, WAS NEGLIGENT.

The underlying claim by Fernando Agueros ("Agueros") against Lanzo Construction Company ("Lanzo"), was based on Agueros' claim that Lanzo, the general contractor, caused his injury by failing to maintain a safe construction site. The specific acts of negligence by Lanzo were failing to have a debris-free work area and an adequate safety rail. The extreme danger was of falling from the inadequately protected edge of the work surface onto solid concrete and steel dowels coming out of the concrete 30 plus feet below.

Lanzo has sought contractual indemnity from Wayne Steel Erectors ("Wayne Steel") for its sole negligence, in order escape its liability, contrary to well-settled law imposing these exact duties on the general contractor, *Funk v General Motors*, 392 Mich 91 (1974); *Hardy v Monsanto*, 414 Mich 29 (1982); *Ormsby v Capital Welding*, 471 Mich 45 (2004); *Ghaffari v Turner Construction*, 473 Mich 16 (2005), and MCL 691.991.

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Initially, Lanzo attempted to defend by refusing to produce its representatives for depositions in both the underlying Agueros case and the current indemnity action. When this strategy failed, Lanzo then attempted to blame the accident on Agueros.

## A. THERE IS NO EVIDENCE OF ANY NEGLIGENCE BY AGUEROS.

The jury instruction for negligence, SJI2d 10.02, states:

> Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore, by 'negligence,' I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case.
>
> The law does not say what a reasonably careful person using ordinary care would or would not do under the circumstances. That is for you to decide.

SJI2d 10.04 states regarding the duty to use ordinary care for an adult plaintiff:

> It was the duty of the plaintiff, in connection with this occurrence, to use ordinary care for his own safety.

There is absolutely no evidence that Agueros failed to do something that a reasonably careful person would do, or did do something that a reasonably careful person would not do, ***under the circumstances that existed in this case.***

Unfortunately, the deposition transcript of Agueros is extremely redundant and confusing. The Lanzo defense strategy appears to have been to raise an open and obvious defense, and to confuse Agueros into providing different versions by going through the event numerous different times. The strategy failed because the open and obvious defense does not apply (*Ghaffari v Turner Construction*, *supra*), and Agueros' version did not change - he ***never*** admitted any negligent act.

The Agueros testimony can be cited out of context as Lanzo did in its Application for Leave to Appeal , i.e., arguing that Agueros placed the debris on the floor, that the debris had

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nothing to do with the trip and fall, that Agueros was carrying the re-bar too close to the guardrail (a mere two inches away) when he tripped and fell, and that he tripped and fell because he "miscalculated" how much room he had to carry the re-bar near a column. (Lanzo's Application for Leave to Appeal, p 5) All of these statements are simply ***false***.

1. None of the debris in the area was from Agueros or Wayne Steel. Agueros testified that the debris consisted of wood, bolts, boxes, plastic and thermalation which came from other contractors and Lanzo, and none of it came from Wayne Steel. (Exhibit E, Agueros dep, pp 48-52, 60-65)

2. Agueros never testified that he was two inches from the rail when he tripped. He testified that the ***column*** was two inches from the railing but that ***Agueros four to six feet away from the railing.*** (Exhibit E, p 88)

3. Although Agueros testified that he miscalculated how far the column was from the re-bar he was carrying, this was not negligence, but only part of the ***accident*** scenario caused by Lanzo's unsafe common work area, as will be pointed out hereafter. This Court's summary of Agueros testimony in paragraph 1 of its Order is also inaccurate, as will be pointed out hereafter. Agueros testified that he had lost his balance ***before*** the re-bar contacted the column.

Unfortunately, in order get an accurate picture of exactly what Agueros testified to, it is only fair to read the entire deposition testimony regarding the accident which covers pages 43-106, 123-127, and 130-31.

Agueros criticized the ladder which the crew had to use to climb onto the structure, the messy, debris-filled work surface, and the wobbly, inadequate railing. Agueros was emphatic that he knew that the railing would not support him and that he knew that he did not want to

fall through the railing because there was concrete with steel dowels sticking up 30 plus feet below.

The following undisputable facts are established by Agueros' testimony:

1. His job involved making multiple trips from different "piles" of re-bar to different locations on the floor where the re-bar was to be placed. (Exhibit E, pp 66, 71, 75, 77-81)

2. The floor had 4-foot cube boxes embedded in the cement (Exhibit E, p 62) and was also covered with debris including anchor bolts, nuts, pieces of wood, and big sheets of plastic. (Exhibit E, pp 49-52, 63, 66-68).

3. The debris was not supposed to be there and none of the debris was from Wayne Steel. (Exhibit E, pp 48-52, 60-65)

4. The guardrail along the edge of the work area was insecure. (Exhibit E, pp 56-60, 97-102, 125)

5. Agueros' job was to carry re-bar from various piles on the floor to different areas on the floor where it was to be placed. Agueros would take different routes, because as you are "building" things change:

> Then we take different routes. Because once you start getting re-bar going, you're building. And once you're building, you know, things start to change. Immediately. (Exhibit E, p 66)

He would take "various paths". (Exhibit E, p 66)

6. Although Agueros testified that he did not trip over anything at the time he fell, he did testify that the debris caused him to have to maneuver through an "obstacle" type course where it was "harder to maneuver" (Exhibit E, p 75), and that although he was starting on the same path, everything was constantly changing:

> Q So you had done somewhere between ten and fifteen trips then from the new pile of re-bar up to the point that your



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incident occurred, five to ten before coffee and five or so after, right?

MR. FAKHOURY: He didn't say the same path.

THE WITNESS: Yeah, right. Because the path starts to change once, because you're starting at one end, going towards the other.

. . . .

Q You had to step over the boxes in order to get to where they were laying the re-bar for that half hour before?

A Towards -- yeah. Towards the end. Because like I said, we go at, you know, so everything changes. It's a constant change, you know. Constantly moving. (Exhibit E, pp 78-79)

7. ***Importantly***, Agueros testified that although he did not trip over anything on the ground, ***it was because of the debris, that he wound up in the position that he was in at the time of the accident***:

Q So in other words, you didn't trip over anything on the ground; is that a fair statement?

A I could say actually the route, the way they had, you know, everything set up and the way there was, the debris was, if I didn't have to take that route, ***I probably would have never ended up in that situation.*** But it wasn't like I, you know, like rolled on a bolt. I'm not going to lie to you, say I rolled on a bolt. (Exhibit E, p 85, emphasis added)

8. At the time, Agueros was carrying 4-6, one inch diameter re-bars, which were 8 to 10 feet long, and weighed 60 to 80 pounds. (Exhibit E, pp 71, 74) He was carrying these bars on his right shoulder, with his right hand closest to his shoulder and his left hand out in front on the bars. (Exhibit E, p 82) The bars were not banded together, but were loose, and he would have to hold them to keep them on his shoulder. (Exhibit E, p 82)

9. He was forced by the debris into the area he was at to unload the re-bar. He was going to swing the re-bar down in front of himself like a curl with weights. (Exhibit E, p 83)



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10. ***Contrary to the Court's Order***, in addition to being forced into this area by the debris, he testified that he was "***already*** like off balance and headed backwards" ***before*** he contacted the column with the re-bar:

> Q So if you're four to five feet away from the railing, you start to jostle the or start to lose control by striking the column, can't you just fall straight down?
> A I could have, but like I said, ***when I had hit it, I was already like off balance and headed backwards.*** You know, once I swung around and I hit, it wasn't, you know, it wasn't like I hit, said oh, just let me drop these because, you know, once it hit, it like shook me. (Exhibit E, p 89, emphasis added)

11. At this point he was four to six feet away from the railing (not two inches as stated by Lanzo's Application for Leave to Appeal, p 5), and the column was two inches from the railing. (Exhibit E, p 88)

12. Contrary to the Court's Order, the "leading" end of the re-bar did not strike the column, it was the rear-end of the re-bar. The column had been in front of him, but as he went to swing the re-bar it was behind him and the end of the re-bar "barely just" contacted the column. (Exhibit E, pp 81-85, 86-89)

13. Because he was "off balance", the 80 pound weight on his shoulder felt like 500 pounds and he had to "get control" of it:

> Q So you're off balance, you've got this 80 pound weight on your shoulder, right?
> A At that time it felt like 500.
> Q And now you want to get control of this, right?
> A Correct. (Exhibit E, p 84)

14. Agueros did not want to go backward toward the railing, and therefore yanked forward at which point he felt a pop in his hip and he fell to the floor. (Exhibit E, pp 84-85)

15. When asked if the re-bar striking the column caused him to lose his balance, he testified only that it had something to do with it:

Q The thing that caused you to lose your balance was striking the re-bar on the column; would you agree with that?

A I would agree that that had something to do with it. (Exhibit E, p 84-85)

16. Contrary to Lanzo's argument, although Agueros stated that he "miscalculated" how much room he had (Exhibit E, pp 87-88), the scenario was not as argued by Lanzo. Agueros was working on a debris-filled floor. The debris pattern caused him to be in the area and the "situation" he was in at the time of the accident. Most importantly, he was ***already*** off balance and headed backwards ***before*** the re-bar contacted the column. As will be pointed out hereafter, *Funk, Hardy, Ghaffari* and *Ormsby* all impose duties regarding safety in common work areas on general contractors like Lanzo for this exact type incident. This was clearly ***not*** a case of comparative negligence on the part of Agueros. It was a blatant breach of Lanzo's responsibilities as the general contractor. Clearly, as a matter of law, Agueros did not fail to do something that a reasonably careful person would do or did something that a reasonably careful person would not do ***under the circumstances that existed in this case***. The all-important circumstances are that Agueros was required to carry 4-6, 8-10 feet long, loose, re-bar on his shoulder through a debris-filled floor area, whose dangerous edge was inadequately guarded by a flimsy guardrail. He lost his balance, through no fault of his own, contacted a column with the end of the re-bar, due to the tight area he was required to work in, and then injured his hip/back when he fell.

An "accident" has been defined by this court in insurance cases as:

> An accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected. *Frankenmuth Mutual Insurance v Masters*, 460 Mich 105, 114 (1990).

This incident was clearly an "accident" and not "negligence" on Agueros' part.



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It is also well-settled from numerous opinions of this court that the mere happening of an accident is not evidence of negligence.

In *Daigneau v Young*, 349 Mich 632 (1957), the plaintiff exited his truck near a sand pit located in an open field, walked about 15 feet, turned, sand blew in his face, he then stepped back one step, when he was then struck by the defendant's passing truck. The court held:

> No presumption of negligence is raised by the mere happening of an accident or proof of injury resulting therefrom. *Brebner v Sidney Hill Health System, Inc.*, 269 Mich 541, 257 N.W. 745. Apropos is the following from *Manley v Potts*, 286 Mich. 671, 282 N.W. 862, 863: 'The only facts that could be legitimately found from the meager evidence presented would be that an accident occurred and that plaintiff was injured. The record is barren of any evidence even remotely tending to establish defendant's negligence, if any. Although the fact that an accident happened may be considered together with other surrounding circumstances in determining if there was in fact negligence (*McLeod v Savoy Hotel Co.*, 267 Mich. 352, 255 N.W. 308), proof of an accident and resulting injury was not alone sufficient to establish defendant's responsibility. *Brebner v Sidney Hill Health System, Inc.*, 269 Mich. 541, 257 N.W. 745; *Warwick v Blackney*, 272 Mich. 231, 261 N.W. 310; *Collar v Maycroft*, 274 Mich. 376, 264 N.W. 407; *Michigan Aero Club v Shelley*, 283 Mich 401, 278 N.W. 121; *Sward v Megan*, 284 Mich. 421, 279 N.W. 886. If defendant was negligent, the burden of presenting the necessary proof thereof rested upon plaintiff, and its absence was not to be supplied by a guess of the jury.'
>
> . . . .
>
> There must be substantial evidence which forms a reasonable basis for the inference of negligence. *Frye v City of Detroit*, 256 Mich. 466, 239 N.W. 886. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess, although legitimate inferences may be drawn from established facts. *Heppenstall Steel Co. v. Wabash Railway Co.*, 242 Mich. 464, 219 N.W. 717. 349 Mich at 635-36.

As applied to the underlying plaintiff, Agueros, although an accident happened, Lanzo has not submitted any evidence of Agueros' negligence. See also: *Barry v Elkin*, 332 Mich 427, 430-31 (1952) ("negligence may not be inferred from the mere happening of an

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accident."); *Mercure v Popig*, 326 Mich 140, 145 (1949) ("the mere happening of an accident raises no presumption of negligence. . . . . a mere claim cannot stand in the place of evidence and operate as proof. . . .things not made to appear must be taken as not existing. . . . plaintiff's case must be established by the evidence. The court may not guess in default of evidence."); *Nagy v Balogh*, 337 Mich 691, 694 (1983) ("The happening of the accident was not of itself proof of negligence on the part of any of those involved."); *Hartsfield v United Technologies Otis Elevator,* 986 F Supp 449, 452 (E.D. Mich 1997) ("To make out a *prima facie* case of negligence, plaintiff must produce evidence sufficient to prove a causal connection between defendant's conduct and plaintiff's injuries. *Moning v Alfono*, 400 Mich 425, 437, 254 NW2d 759 (1977). It is well-settled under Michigan law that accidents do not equal negligence and that negligence cannot be inferred from the mere proof of an accident and consequent injury.")

## II. MICHIGAN LAW REQUIRES THE IMPOSITION OF LIABILITY ON THE GENERAL CONTRACTOR FOR SAFETY IN COMMON WORK AREAS.

Commencing with *Funk v General Motors*, *supra*, this Court has repeatedly held that the general contractor has "ultimate responsibility" for job safety in common work areas ***to encourage implementation of reasonable safeguards against risks of injury***:

> The policy behind the law of torts is more than compensation of victims. ***It seeks also to encourage implementation of reasonable safeguards against risks of injury.***
>
> Placing ***ultimate responsibility*** on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
>
> "[A]s a practical matter in many case only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * * [I]t must

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> be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so." *Alber v* Owens, 66 Cal 2d 790; 59 Cal Rptr 117, 121-122; 427 P2d 781 (1967).
>
> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoided dangers in common work areas which create a high degree of risk to a significant number of workmen. 392 Mich at 104, emphasis added.

In *Funk*, the plaintiff Funk had removed roof slabs in order to access piping which was hung from steel beams of the superstructure of the building. He then fell through one of the openings he created. This Court recognized that the ***cause of the injury was the job environment that Funk was required to work in*** without adequate safety equipment, that it was an ***appropriate development of the law of torts*** to impose responsibility on the general contractor for failure to implement safety measures in common work areas, and that in such cases Funk's contributory negligence would ***not*** be a defense:

> We are satisfied, however, for reasons already stated, that on the facts of this case it is an appropriate development of the law of torts to impose responsibility on a general contractor for failure to implement safety measures in common work areas guarding against readily observable, avoidable serious risks of personal injury.
>
> . . . .
>
> A jury could properly conclude that a cause of Funk's injury was the job environment created by the defendants which had conditioned him to work without regard to the conspicuous absence of safety equipment. The Ben Agree foreman had instructed, "If you don't want to work up in the steel, go home". Funk, a house plumber, had not previously worked on a construction project of this magnitude. He was given no safety indoctrination.
>
> The question of contributory negligence is generally one of fact, not of law. ***There was adequate evidence from which the jury could conclude that Funk did not act unreasonably in the circumstances by going upon and opening a hole in the roof.*** 392 Mich at 112-113, emphasis added.

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In *Tulkku v Mackworth Rees*, 406 Mich 615 (1979), this Court recognized that workman often have no choice but to work with the equipment at hand with inadequate or faulty safety equipment, and that in such a construction or industrial setting the employee's contributory negligence should not be a defense, because it would be anomalous to hold that a defendant, who had a duty to provide safety, could breach that duty with no liability for the very injury the duty was meant to protect against:

> "They [workmen] usually have no choice but to work with the equipment at hand, thought danger looms large. The legislature recognized this and, to guard against the known hazards of the occupation, required the employer to safeguard the workers from injury caused by *faulty or inadequate* equipment. If the employer could avoid this duty by pointing to the concurrent negligence of the injured worker in using the equipment, the beneficial purpose of the statute might well be frustrated and nullified." *Koenig, supra,* 318-319. (Emphasis added.)
>
> . . . .
>
> But the inherent danger posed by the inadequate safety device may constitute a greater risk for the employee than no device at all. The construction worker or the employee in an industrial setting has come to rely on the effectiveness of the safety equipment he or she uses. There is no way this employee can protect himself from inherently dangerous, defectively designed safety equipment because there is no way the employee can comprehend or appreciate the danger posed.
>
> The Court in *Funk* concluded:
>
> > "A jury could properly conclude that a cause of Funk's injury was the job environment created by the defendants which had conditioned him to work without regard to the conspicuous absence of safety equipment." *Funk, supra,* 112-113.
> >
> > . . . .
> >
> > "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against. We hold that under the facts presented to us in this case the defense of contributory negligence is unavailable." *Bexiga v Havir Manufacturing Corp,* 60 NJ 402, 412; 290 A2d 281 (1972). (Citations omitted.) 406 Mich at 620, 621-22.

In *Hardy v Monsanto*, 414 Mich 29 (1992), this Court recognized that with the advent of comparative negligence, it would allow comparative negligence to be asserted as a defense

in cases where *Funk* and *Tulkku* had formerly prohibited the contributory negligence defense. 414 Mich at 38. However, this Court continued to recognize that a general contractor in a construction setting should ***not*** be allowed to avoid its liability by pointing to the concurrent negligence of the injured worker, who was working without adequate safety equipment. Specifically the Court stated:

> If a worker, acting reasonably under all the circumstances, will continue to work under the dangerous conditions, then the trier of fact could not conclude that the worker's recovery should be reduced, ***since the worker by definition was not negligent . . . .*** much the same response is appropriate to the comment that workers often become conditioned to working in dangers and deal with them prudently: ***continuing to work under those conditions would not constitute negligence on the part of the worker.*** 414 Mich at 41, 42, emphasis added.

In *Ormsby v Capital Welding*, 471 Mich 45 (2004), once again this Court affirmed the holding of *Funk*, in creating the exception to the general rule of non-liability of an employer of an independent contractor, holding that the general contractor is responsible for safety in common work areas:

> Departing from established law, this Court set forth an exception in circumstances involving construction projects and affirmed the verdict against Darin:
>
> > We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. [*Funk, supra* at 104.] 471 Mich at 53-54.

In *Ghaffari v Turner Construction*, 473 Mich 16 (2005), this Court once again affirmed the importance of the imposition of liability on general contractors for safety in common work areas.

First, the court noted the practical considerations that supported this liability:



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However, in *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), this Court departed from this traditional framework and set forth an exception to the general rule of nonliability in cases involving construction projects:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against *readily observable, avoidable dangers* in common work areas which create a high degree of risk to a significant number of workmen. [Emphasis added.]

We also articulated several practical considerations that supported this exception:

> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
>
> [A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * *[I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so. {*Id.* (internal citation and quotation marks omitted).] 473 Mich at 20-21.

The Court next noted the "irreconcilable conflict" between the common work area doctrine and the open and obvious defense, finding that they were "incompatible":

> Thus, an irreconcilable conflict immediately arises: one doctrine (common work area) imposes an affirmative duty to protect against hazards that are open and obvious, while the other (open and obvious) asserts that *no* duty exists if the hazards are open and obvious. Because of this logical conflict, we have no difficulty in concluding that the open and obvious doctrine and the common work area doctrine are incompatible. 473 Mich at 22-23.

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Third, the Court noted that the "foundational consideration" underlying the common work area doctrine was job site safety, and noted that due to hazards typically found at construction sites, what constitutes "ordinary care" in a premises liability setting ***may differ substantially*** from what constitutes "ordinary care" in a construction setting:

> While the foundational consideration underlying the common work area doctrine is one of job site safety, safety concerns of course are not limited to the construction setting. While our opinion today distinguishes the common work area doctrine from the open and obvious doctrine, we emphasize our view that the latter doctrine also promotes safety concerns, albeit in a different manner. As is apparent from our discussion later in this opinion of the hazards typically found in a construction site, ***what constitutes 'ordinary care' in a premises liability setting may differ substantially from what constitutes 'ordinary care' in the construction setting.*** 473 Mich at 25, note 5, emphasis added.

This Court next noted that if it adopted the open and obvious defense in the general contractor setting, it would ***thwart*** the goals of workplace safety advanced in *Funk* and *Hardy*, which recognized that barring recovery provided a strong financial incentive for contractors to ***breach*** their duty to undertake reasonable safety precautions:

> The adoption of the open and obvious doctrine in the general contractor setting would tend to thwart the goals of workplace safety advanced by our decisions in *Funk* and *Hardy*. If we were to adopt the rule set forth below by the Court of Appeals, we would effectively return to a contributory negligence regime. In such a case, no matter how negligent the general contractor was in creating or failing to ameliorate the hazard, the employee would be barred from recovery because the hazard was open and obvious.
>
> ***Hardy recognized that such bars to recovery 'provide a strong financial incentive for contractors to breach the duty to undertake reasonable safety precautions.'*** *Id.* at 41. Indeed, such a rule might lead to a paradoxical result -- the more egregious (i.e., obvious) the safety violation, the less incentive the contractor would have to ameliorate the hazard, because of the knowledge that obviousness of the hazard would bar the contractor's liability for the resulting injury. Instead, *Hardy* adopted a comparative negligence rule on the grounds that such a rule retains a strong incentive for general contractors to maintain

> workplace safety. Accordingly, we believe that *Hardy* supports the conclusion that the open and obvious doctrine should remain distinct from the common work area doctrine. 473 Mich at 27.

Finally, this Court recognized that, as noted in footnote 5, there are unique and distinct attributes of the construction setting, different from other settings, which would make rules applicable, for instance, in the typical premises liability setting ***inappropriate***, because construction sites typically involve the comings and goings of multiple subcontractors and their materials, a venue that is constantly being subjected to alteration, with any number of hazards that are evolving by the moment, from different dimensions, which often may be in motion, accompanied by loud and sudden noises and other distracting events, with workers involved in physical exertion, and facing time constraints:

> As a third distinction between the two doctrines, we offer a final observation grounded in the nature of the different harms confronted in the realms in which each doctrine is applicable. In particular, there exist unique and distinct attributes of the construction setting that would make the rules applicable in the typical premises liability setting inappropriate.
>
> Construction sites typically involve the comings and goings of multiple subcontractors and their materials, a physical venue that is constantly being subjected to alteration, with any number of open hazards that are evolving by the moment. The hazards existing at construction sites are numerous and may typically come from any one of three dimensions, including from above. These hazards may often be in motion. Loud and sudden noises may surround and distract the construction worker, with many of these noises emanating from the dangerous activities carried out by fellow workers who may be near. Nonetheless, at the same time that he or she is confronted with such an environment, the construction worker must move at a business-like pace in order to carry out his or her job --one that may require considerable physical exertion, and require attention to detail and compliance with demanding professional standards --in a timely manner. This is in contrast to the typical premises liability case in which the open and obvious hazard is found on or near ground level, and in which distractions, although they may sometimes exist, are of a considerably less urgent and persistent character than those faced by the construction worker. While the construction worker still bears the responsibility of carrying out his or her



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> work in a reasonable and prudent manner, the worker will typically encounter more dangers of a more diverse character, and more distractions coming from more directions, than will persons shopping in retail establishments or walking in parking lots or visiting the residences of others, and will generally be less able to avoid a given hazard than the typical invitee or licensee, even if the hazard may be seen after the fact as open and obvious. 473 Mich at 27-29.

This court concluded that it is the general contractor who has the coordinating power and supervisory authority to insure that this unusual array of physical risks is protected:

> It is the general contractor who has the coordinating power and supervisory authority to ensure that this unusual array of physical risks does not devolve into chaos, and it is the general contractor upon whom ultimate responsibility for the safe completion of a project rests. As the overall coordinator of this activity, the general contractor is best situated to ensure workplace safety at the least cost. Because of this position, the duty to keep common work areas safe reasonably falls on the general contractor. 473 Mich at 29.

All of this well-settled judicial authority is directly contrary to Lanzo's attempt to avoid its general contractor liability. The Agueros accident is the exact setting referred to in *Ghaffari*. Agueros was faced with a constantly changing job environment, with hazards in multiple dimensions (on the floor and above the floor), an unguarded work edge, physical exertion (carrying 4-6, 8 to 10 foot long re-bar weighing up to 80 pounds on his shoulder), while having to work in a timely manner to complete the job in a professional manner. He was unnecessarily faced with hazardous and dangerous conditions which were all the sole and exclusive responsibility of Lanzo, a debris-filled floor and an inadequately guarded work platform, with a high risk of serious injury or death. It is undisputed that the work area was a common work area utilized by different subs and Lanzo's own employees. As stated in *Hardy*, Agueros' work under these conditions "would not constitute negligence on the part of the worker." *Hardy, supra* at 41, 42.

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The record as summarized in the counter-statement of facts of Wayne Steel's answer to Lanzo's Application for Leave to Appeal clearly indicates that Lanzo's own job superintendent (Jack Parinello) confirmed that Wayne Steel was the "best sub" Parinello ever had on this job or any other job and did its work in a safe fashion, that Wayne Steel had no responsibility regarding the debris or guardrail, that the debris and guardrail were the responsibility of Lanzo, and that according to the Detroit/Lanzo contract, Lanzo was required to provide, erect and maintain all necessary barricades, and that the contract further required Lanzo to be ***solely*** responsible for all safety precautions and programs. Lanzo has no other witnesses. Its only other witness is Joseph Czerak, who was hired as a consultant to wrap up Lanzo's affairs in Michigan when it left the state (Exhibit M, pp 4-5), and Czerak knew nothing about the Agueros accident or any of Wayne Steel's work on the project. In addition, Wayne Steel submitted unrebutted affidavits that Lanzo was responsible to clean up the debris and maintain the guardrails where the Agueros accident occurred, that Wayne Steel had no responsibility regarding the debris or guardrails, and that the accident occurred in a common work area. (See Exhibits R and S)

## III. ALLOWING LANZO TO OBTAIN CONTRACTUAL INDEMNITY IS NOT ONLY CONTRARY TO THIS COURT'S HOLDINGS IN *FUNK* AND ITS PROGENY, IT IS ALSO CONTRARY TO THE LEGISLATIVE INTENT EXPRESSED BY MCL 691.991.

The legislature enacted MCL 691.991 to prevent a contractor from obtaining contractual indemnity for its sole negligence in construction cases:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promise against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee

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> or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

To allow Lanzo to obtain contractual indemnity in this case would be in disregard of this statute and the legislative intent.

Lanzo had the duty to provide job safety in common work areas. Lanzo, in dereliction of its duty, provided Agueros with a debris-strewn work area with an inadequately guarded edge. Agueros was forced to confront this situation throughout the work day until his accident occurred, as a direct result of this unsafe common work area. Lanzo should not be allowed to escape its liability by obtaining contractual indemnity from Agueros' employer Wayne Steel. This is exactly what MCL 691.991 was intended to avoid. As Agueros argued in the underlying case, Lanzo was an irresponsible, "outlaw" contractor, with multiple safety violations, including criminal charges for involuntary manslaughter, who has since fled the State of Michigan. (Exhibit V, Exhibit M, pp 4-6).

In *Darin & Armstrong v Ben Agree Company*, 88 Mich App 128 (1979), lv den 406 Mich 1007 (1979), Darin & Armstrong sought to obtain common law and contractual indemnity from Ben Agree Company, the employer of Funk. This attorney defended Ben Agree, and argued that to allow Darin & Armstrong to obtain common law or contractual indemnity from Ben Agree would be in complete disregard of the Supreme Court's reasoning and decision in *Funk*. The trial court and the court of appeals agreed, granting summary judgment to Ben Agree holding:

> In the original lawsuit by Funk, Darin & Armstrong was found personally, actively negligent. In upholding the jury verdict, the Court stated at 104:
>
> > "We regard it to be part of the business of a general contractor to assure that reasonable steps within it supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which

> create a high degree of risk to a significant number of workmen."
>
> The above statement followed a discussion of the necessity to place "ultimate responsibility" on the general contractor for job safety, the recognition that as a practical matter, often only the general contractor is in a position to provide safety features, and finally, the facts shown in the jury trial: That Darin & Armstrong's project superintendent made repeated tours of the job site throughout each day, a job site where the complete absence of safety equipment for people working 30 feet above ground was "obvious to even the most casual observer". *Funk, supra,* at 103. This is not "passive negligence". See *Moore v Lewis Manufacturing Co,* 406 F Supp 1225, 1227 (ED Mich, 1976). ***To allow indemnification on these facts would be to defeat the Supreme Court's intention in Funk***. 88 Mich App at 133, emphasis added.

The court held that Darin & Armstrong was not free from active negligence or personal fault thus barring its common law indemnity claim (88 Mich App at 133), and that Darin & Armstrong's sole negligence also defeated its contractual indemnity claim pursuant to MCL 691.991. 88 Mich App at 136.

Similarly, in *Turner Construction v Robert Carter Corp.*, 162 F.3d 1162 (6th Cir., (Mich) 1998), the 6th Circuit Court of Appeals rejected the general contractor Turner's contractual indemnity claim against a subcontractor holding:

> The contract simply cannot be read to ascribe to every negligent act by Turner, "connected" in any way with the project-no matter how attenuated-Carter's duty to indemnify. With comparative fault and zealous advocacy, it does not seem farfetched to think that nearly any case could generate at least a wisp of negligence by a plaintiff. This would accomplish by chance what Michigan public policy expressly prohibits-the unconscionable practice of coercing subcontractors into becoming insurers exposed to nearly unlimited liability.
>
> Although Turner urges Fulan's alleged negligence gives rise to Carter's duty to indemnify, the fact remains that Turner was sued for its own negligence. The indemnity clause in the contract contains no patent ambiguity. The latent ambiguity Turner proposed never materialized, and Turner offered no evidence to prove its existence. Since the court will not manufacture an



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> ambiguity merely to keep a lawsuit alive, the district court properly found that Carter was entitled to judgment as a matter of law.

Similarly here, Lanzo is utilizing a 189 word single-sentence indemnity agreement, which makes no reference to the project or any work by Wayne Steel, to attempt to recover contractual indemnity for its own, sole negligence. As noted in *Turner*, it has attempted to convince this Court that there is at least a "wisp of negligence" by the underlying plaintiff Agueros, which thus allows Lanzo to avoid all of its safety responsibilities and its own sole negligence, which results in Lanzo "accomplishing by chance" what the Michigan legislature has expressly prohibited, the unconscionable practice of coercing subcontractors into becoming insurers of the general contractor's sole negligence. All of this is to the absolute detriment of the subcontractor's employees such as Agueros. This practice effectively avoids the duties imposed on the general contractor, Lanzo, by this Court. Lanzo can be as negligent as it wants, because it is fully indemnified by its subcontractor.

In this case there is no "wisp of negligence" by Agueros. From the standpoint of Agueros, there was an "accident". From the standpoint of Lanzo, Lanzo was solely negligent in causing Agueros' injury by providing a completely unsafe common work area.

**RELIEF REQUESTED**

It is respectfully requested that this Honorable Court deny the application for leave to appeal by the plaintiff-appellate Lanzo Construction Company, and affirm summary disposition for the defendant-appellee, Wayne Steel Erectors, with costs to be taxed.

Respectfully Submitted,
HARVEY KRUSE, P.C.

BY: _____

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DATED: October 13, 2006



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**PROOF OF SERVICE**

**JANICE A. ALBERTSON**, being first duly sworn, deposes and says that on the 13th day of October, 2006 she caused to be served a duplicate copy of Supplemental Brief by Defendant-Appellee, Wayne Steel Erectors, to Response to Supreme Court's Order of September 15, 2006 upon attorneys of record by enclosing a copy thereof in a well sealed envelope to addressed to:

Noreen L. Slank
Deborah A. Hebert
4000 Town Center, Suite 909
Southfield, MI 48075

Richard A. Kudla
One Towne Square, Suite 1800
Southfield, MI 48076-3726

with full legal postage prepaid thereon and deposited the same in the United States mailbox in the City of Troy.

Janice A. Albertson
JANICE A. ALBERTSON

Subscribed and sworn to before me
this 13th day of October, 2006.

Lisa Simpkins
LISA SIMPKINS
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Mar 7, 2011
ACTING IN COUNTY OF